PERBADANAN NASIONAL INSURANS SDN. BHD.

v.

PUA LAI ONG

COURT OF APPEAL, KUALA LUMPUR
DATO' SITI NORMA YAAKOB JCA
DATO' ABDUL MALEK AHMAD JCA
DATUK MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: B-02-370-95]
11 JULY 1996

CIVIL PROCEDURE: *Affidavits - Affidavit in reply - Time limit for filing and service - Rules of the High Court 1980, O. 32 r. 13(2)(b) - When does time start to run under O. 32 r. 13(2)(b) - Whether upon service of unsealed copy of summons - Or upon service of sealed copy of summons - Whether affidavit in reply can be used in hearing.*

CIVIL PROCEDURE: *Summons-in-chambers - Filing and service - Sealed and unsealed copies - Whether service of unsealed copy has legal effect - Whether O. 32 r. 13(2)(b) of Rules of the High Court 1980 activated - Whether receiver of summons legally obligated to reply.*

CIVIL PROCEDURE: *Summary judgment - Rules of the High Court 1980, O. 14 - Applicability of O. 32 r. 13(2) in O. 14 proceedings - When applicable and when inapplicable - Whether applicable to affidavits in support – Whether applicable to affidavits in reply - Non-compliance with O. 32 r. 13(2)(b) - Whether Court has discretion to allow use of affidavit in reply at hearing.*

In the Court below, the plaintiff ('the respondent') had commenced proceedings against the defendant ('the appellant') to enforce a judgment for damages for personal injuries which he had obtained against the driver of a motor vehicle with whom he was involved in a collision. At that material time, the said motor vehicle was insured with a French-based insurance company ('the company') whose business in Malaysia was being conducted by the appellant.

Thereafter, the appellant entered a conditional appearance to the respondent's writ and statement of claim, and this was followed by an application under O. 2 r. 2 of the Rules of the High Court 1980 ('the RHC') to set aside the said writ and statement of claim on the ground that the respondent had sued the wrong party, *viz*, that the insurance policy was issued by the company and not the appellant.

At the hearing of the appellant's application to set aside, the appellant raised the preliminary objection that the respondent could not rely on his affidavit in reply which was affirmed on 13 April 1995 as it did not comply with O. 32

r. 13(2)(b) of the RHC. In the result, the trial Judge disallowed the appellant's preliminary objection and the appellant appealed.

The material facts and sequence of events of the case were as follows. The appellant filed his summons-in-chambers on 28 February 1995 together with his affidavit in support which was affirmed a day earlier. At the same time, the appellant served an unsealed copy of the summons together with the affidavit in support on the respondent. This was received by the respondent on 3 March 1995. Subsequently, the appellant served the sealed copy of the summons issued under O. 32 r. 2(1) of the RHC together with the affidavit in support on the respondent on 12 April 1995. On 14 April 1995, the respondent filed his affidavit in reply which was affirmed a day earlier, and served a copy of it on the appellant on the same day it was filed.

The appellant's preliminary objection was taken up on the basis that the respondent's affidavit in reply was filed and served outside the time stipulated in O. 32 r. 13(2)(b) of the RHC, namely, that the respondent had received the appellant's affidavit in support on 3 March 1995 and thus had to file and serve his affidavit in reply within 14 days from that date.

The issue before the Court was when did time start to run under O. 32 r. 13(2)(b) of the RHC; was it from the time the respondent received the appellant's affidavit in support together with the unsealed copy of the summons, ie, on 3 March 1995, or, from the time the respondent received the appellant's affidavit in support together with the sealed copy of the summons, ie, on 12 April 1995.

Held:

Per Siti Norma Yaakob JCA (delivering the judgment of the Court):

[1] Order 32 r. 13(2) which came into effect on 1 August 1993 was added by way of an amendment to the RHC for the orderly disposal of applications in chambers. It sets out the time-frame within which affidavits, intended to be used in proceedings in chambers either in support of or in reply to such applications, are to be filed and served thereby preventing any last minute filing and service of such affidavits which before the amendment would have necessitated such applications being adjourned repeatedly thereby causing delay.

[2] Every application in chambers must normally begin by way of summons supported by an affidavit affirmed by the party making the application. Both the summons and affidavit must be filed and served on the other party as required by O. 32 r. 2(1) & (2) read together with O. 32 r. 13(1)(a) of the RHC. The right to reply by affidavit is then open to the other party but this right must be exercised within the 14-day period stipulated in O. 32 r. 13(2)(b) of the RHC.

[3] The purpose of an affidavit in support is to lay down the foundation of the application by way of the statements of facts and law disclosed in the affidavit. An affidavit in reply is either to affirm or rebut such statements of facts or law and, more often than not, to object generally to the application being granted. With such specific purposes, it is only right and proper that the parties exchange affidavits with each other so that none is taken by surprise at the hearing of the application.

[4] In the instant case, the purpose of serving the unsealed copy of the summons together with the affidavit in support could be nothing more than to give due notice to the respondent of the nature of the application and the grounds supporting the application. It could not do anything more than this as the unsealed copy of the summons did not have the official stamp of the Court to clothe it with the authority of being issued pursuant to O. 32 r. 2(1) of the RHC. An affidavit in support cannot exist independently of the summons, and until the summons it supports is sealed, it has no legal effect nor does it create any obligation on the part of the party served with such an affidavit to reply it.

[5] In the instant case, the sealed copy of the appellant's summons together with his affidavit in support was served on the respondent on 12 April 1995, and the respondent filed and served his affidavit in reply on the appellant on 14 April 1995. Consequently, the respondent's affidavit in reply was filed and served well within the 14-day period stipulated in O. 32 r. 13(2)(b) of the RHC.

Obiter dicta:

[1] Order 32 r. 13(2) of the RHC begins with the following qualifying words: "Save as otherwise provided in these rules". Hence, when the RHC makes specific provisions as to the filing and service of affidavits for use in proceedings in chambers, those specific provisions must be adhered to. It is only when the RHC is silent as to the procedure on the filing and service of such affidavits that the general provisions of O. 32 r. 13(2) become applicable.

[2] In respect of applications for summary judgment under O. 14 of the RHC, O. 14 r. 2(3) prescribes a "four clear days before the return date" time-frame within which affidavits in support must be filed and served. However, there is no corresponding time-frame prescribed in respect of affidavits in reply either in O. 14 r. 4 or any other rule. It is to fill this *lacuna* in the procedure that O. 32 r. 13(2)(b) may be relied upon to fill in the gap. To this end, the provisions of O. 32 r. 13(2)(b) are applicable in proceedings for summary judgment under O. 14 of the RHC. Therefore, the decision of the High Court in the case of *Wing Teik Holdings Bhd. v. Yong Chee Thiam & Anor* on the applicability of O. 32 r. 13(2)(b) of the RHC in O. 14 proceedings is correct in law.

[3] The Court has no discretion to allow an affidavit in reply to be used in proceedings brought under O. 14 of the RHC if it was filed and/or served outside the time period prescribed in O. 32 r. 13(2)(b) of the RHC. In such circumstances, recourse may be had by way of an application for an abridgement of the period required to file the affidavit in reply pursuant to O. 3 r. 5(1) of the RHC.

[Appeal dismissed]

***[Bahasa Malaysia** Translation of Headnotes]*

***PROSEDUR SIVIL:** Afidavit-afidavit - Afidavit jawapan - Tempoh masa yang dihadkan bagi pemfailan dan penyampaian - Kaedah-kaedah Mahkamah Tinggi 1980, A. 32 k. 13(2)(b) - Bilakah masa menjadi kesuntukan di bawah A. 32 k. 13(2)(b) - Samada setelah penyampaian salinan saman yang belum dimeterai - Atau setelah penyampaian salinan saman yang telah dimeterai - Samada afidavit jawapan boleh digunakan dalam perbicaraan.*

***PROSEDUR SIVIL:** Saman dalam kamar - Pemfailan dan penyampaian - Salinan-salinan yang telah dimeterai dan tidak dimeterai - Samada penyampaian salinan yang tidak dimeterai mempunyai kesan undang-undang - Samada A. 32 k. 13(2)(b) Kaedah-kaedah Mahkamah Tinggi 1980 dilaksanakan - Samada penerima saman secara sah disisi undang berkewajipan untuk menjawab.*

***PROSEDUR SIVIL:** Penghakiman terus - Kaedah-kaedah Mahkamah Tinggi 1980, A. 14 - Kepemakaian A. 32 k. 13(2) dalam prosiding A. 14 - Bilakah terpakai dan bila pula tidak - Samada terpakai kepada afidavit sokongan - Samada terpakai kepada afidavit jawapan - Ketidak-patuhan A. 32 k. 13(2)(b) - Samada Mahkamah mempunyai budibicara untuk membenarkan penggunaan afidavit jawapan di perbicaraan.*

Dalam Mahkamah dibawah, plaintif ("respondent") telah memulakan prosiding terhadap defendan ("perayu") untuk menguatkuasakan satu penghakiman bagi mendapatkan gantirugi untuk kecederaan persendirian yang mana beliau telah perolehi terhadap pemandu sebuah kenderaan bermotor dengan siapa beliau telah terlibat dalam satu perlanggaran. Pada waktu yang material itu, kenderaan bermotor tersebut telah diinsurankan dengan sebuah syarikat insuran yang berasal dari Peranchis ("syarikat tersebut") yang mana perniagaannya di Malaysia telah dikendalikan oleh perayu.

Selepas itu, perayu telah memasukkan satu kehadiran bersyarat kepada writ dan pernyataan tuntutan responden, dan ini telah dituruti oleh satu permohonan di bawah A. 2 k. 2 Kaedah-kaedah Mahkamah Tinggi 1980 ("KMT") untuk mengenepikan writ dan pernyataan tuntutan tersebut atas alasan bahawa responden telah mendakwa pihak yang salah, iaitu bahawa polisi insuran tersebut dikeluarkan oleh syarikat tersebut dan bukannya perayu.

Di perbicaraan permohonan perayu untuk pengenepian, perayu telah membangkitkan bantahan awal bahawa responden tidak boleh bergantung kepada afidavit jawapannya yang telah diikrarkan pada 13 April 1995 kerana ianya tidak mematuhi A. 32 k. 13(2)(b) KMT. Akibat daripada itu, Hakim perbicaraan telah menolak bantahan awal perayu dan perayu telah merayu.

Fakta-fakta material dan urutan peristiwa-peristiwa kes tersebut adalah seperti berikut. Perayu telah memfailkan saman dalam kamarnya pada 28 Februari 1995 bersama-sama dengan afidavit sokongannya yang mana telah diikrarkan satu hari lebih awal. Pada waktu yang sama, perayu telah menyampaikan satu salinan saman tersebut yang tidak dimeteraikan bersama-sama dengan afidavit sokongan ke atas responden. Ini telah diterima oleh responden pada 3 Mac 1995. Berikutan itu, perayu telah menyampaikan sesalinan saman yang telah dimeterai yang mana telah dikeluarkan di bawah A. 32 k. 2(1) KMT bersama-sama dengan afidavit sokongan ke atas responden pada 12 April 1995. Pada 14 April 1995, responden telah memfailkan afidavit jawapannya yang mana telah diikrarkan satu hari lebih awal, dan menyampaikan sesalinan daripadanya ke atas perayu pada hari pemfailannya.

Bantahan awal perayu telah dibuat atas dasar bahawa afidavit jawapan responden telah difailkan dan disampaikan di luar jangka waktu yang ditetapkan dalam A. 32 k. 13(2)(b) KMT, iaitu bahawa responden telah menerima afidavit sokongan perayu pada 3 Mac 1995 dan dengan itu haruslah memfailkan dan menyampaikan afidavit jawapannya dalam tempoh 14 hari daripada tarikh itu.

Isu di hadapan Mahkamah adalah, bilakah masa menjadi suntuk di bawah A. 32 k. 13(2)(b) KMT, adakah ianya daripada masa responden menerima afidavit sokongan perayu bersama-sama dengan salinan saman-saman yang tidak dimeterai, iaitu pada 3 Mac 1995, atau, daripada masa responden menerima afidavit sokongan perayu bersama-sama dengan salinan saman-saman yang telah dimeterai, iaitu pada 12 April 1995.

Diputuskan:

Oleh Siti Norma Yaakob HMR (menyampaikan penghakiman Mahkamah):

[1] Aturan 32 k. 13(2) yang mana mula berkuatkuasa pada 1 Ogos 1993 telah ditambah melalui satu pindaan kepada KMT untuk penyelesaian permohonan-permohonan dalam kamar secara teratur. Ianya membentangkan jangka masa dalam mana afidavit-afidavit, yang diniatkan untuk digunakan dalam prosiding-prosiding dalam kamar samada bagi menyokong atau sebagai jawapan kepada permohonan-permohonan yang sedemikian, hendaklah difailkan dan disampaikan, yang dengan itu mencegah pemfailan dan penyampaian afidavit-afidavit yang sedemikian pada saat-saat terakhir, yang mana sebelum pindaan tersebut akan memerlukan supaya permohonan-permohonan yang sedemikian ditangguhkan berulang-kali, yang dengan itu menyebabkan kelewatan.

[2] Setiap permohonan dalam kamar hendaklah secara lazimnya bermula melalui saman yang disokong oleh satu afidavit yang telah diikrarkan oleh pihak yang membuat permohonan tersebut. Kedua-dua saman dan afidavit tersebut mesti difailkan dan disampaikan ke atas pihak yang satu lagi itu sepertimana yang dikehendaki oleh A. 32 k. 2(1) & (2) yang dibaca bersama dengan A. 32 k. 13(1)(a) KMT. Hak untuk menjawab melalui afidavit adalah dengan itu terbuka kepada pihak yang lagi satu itu tetapi hak ini mesti dilaksanakan dalam tempoh 14 hari sepertimana yang ditentukan dalam A. 32 k. 13(2)(b) KMT.

[3] Tujuan sesuatu afidavit sokongan adalah untuk membentangkan asas permohonan tersebut melalui pernyataan-pernyataan fakta dan undang-undang yang didedahkan dalam afidavit. Sesuatu afidavit jawapan adalah samada untuk mengikrarkan atau mematahkan pernyataan-pernyataan fakta atau undang-undang yang sedemikian dan, lebih kerap lagi, untuk membantah secara amnya terhadap pemberian permohonan tersebut. Dengan tujuan-tujuan khusus yang sedemikian, ianya adalah betul dan wajar bahawa pihak-pihak tersebut saling menukar afidavit antara satu dan yang lain supaya tidak satu pihak pun akan terperanjat di perbicaraan permohonan tersebut.

[4] Dalam kes semasa ini, tujuan menyampaikan salinan saman yang tidak dimeteraikan bersama-sama dengan afidavit sokongan mungkin tidak lebih daripada memberikan notis awal kepada responden akan sifat permohonan tersebut dan alasan-alasan yang menyokong permohonan tersebut. Ianya tidak boleh melakukan apa-apa pun yang lebih daripada itu oleh kerana salinan saman-saman yang tidak dimeterai tidak mempunyai cop rasmi Mahkamah bagi memberikannya kuasa sebagai telah dikeluarkan selaras dengan A. 32 k. 2(1) KMT. Sesuatu afidavit sokongan tidak mungkin wujud secara bebas dari saman dan sehingga saman yang disokong olehnya itu dimeteraikan, ianya tidak mempunyai kesan undang-undang mahupun mewujudkan apa-apa kewajipan di pihak yang disampaikan dengan afidavit yang sedemikian bagi menjawabnya.

[5] Dalam kes semasa ini, salinan saman perayu yang telah dimeterai bersama-sama dengan afidavit sokongannya telah disampaikan ke atas responden pada 12 April 1995, dan responden telah memfailkan dan menyampaikan afidavit jawapannya ke atas perayu pada 14 April 1995. Akibatnya, afidavit jawapan responden telah difailkan dan disampaikan jauh sebelum tempoh 14 hari yang ditetapkan di dalam A. 32 k. 13(2)(b) Kaedah-kaedah Mahkamah Tinggi.

Obiter dicta:

[1] Aturan 32 k. 13(2) KMT bermula dengan perkataan-perkataan kelayakan yang berikut: "Melainkan sepertimana yang diperuntukan sebaliknya dalam kaedah-kaedah ini". Dengan itu, bilamana KMT membuat peruntukan-peruntukan yang khusus berhubung dengan pemfailan dan penyampaian afidavit-afidavit untuk digunakan dalam prosiding-prosiding dalam kamar, peruntukan-peruntukan khusus tersebut mestilah dipatuhi. Ianya hanya bilamana KMT tidak menyentuh mengenai prosedur berhubung dengan pemfailan dan penyampaian afidavit-afidavit yang sedemikian bahawa peruntukan am A. 32 k. 13(2) menjadi terpakai.

[2] Berhubung permohonan-permohonan untuk penghakiman terus di bawah A. 14 KMT tersebut, A. 14 k. 2(3) menetapkan tempoh "four clear days before the return date" (empat hari sebelum tarikh pemulangan) dalam mana afidavit-afidavit sokongan mesti difailkan dan disampaikan. Walaubagaimanapun tidak terdapat tempoh masa bersamaan yang ditentukan berhubung dengan afidavit-afidavit jawapan samada dalam A. 14 k. 4 atau mana-mana kaedah yang lain. Ianya adalah untuk mengisi kekosongan (*lacuna*) dalam prosedur ini bahawa seseorang itu boleh bergantung kepada A. 32 k. 13(2)(b). Setakat ini, peruntukan A. 32 k. 13(2)(b) adalah terpakai dalam prosiding-prosiding untuk penghakiman terus di bawah A. 14 KMT. Dengan itu keputusan Mahkamah Tinggi dalam kes *Wing Teik Holdings Bhd. lwn. Yong Chee Thiam & Anor.* ke atas kepemakaian A. 32 k. 13(b)(b) KMT dalam prosiding-prosiding A. 14 adalah betul menurut undang-undang.

[3] Mahkamah tidak mempunyai budibicara bagi membenarkan sesuatu afidavit jawapan untuk digunakan dalam prosiding yang dimulakan di bawah A. 14 KMT dan jika ianya telah difailkan dan/atau disampaikan diluar jangka masa yang ditentukan dalam A. 32 k. 13(2)(b) KMT. Dalam keadaan yang sedemikian, pihak yang bersalah boleh memohon untuk mendapatkan satu penyingkatan tempoh yang diperlukan bagi memfailkan afidavit jawapan selaras dengan A. 3 k. 5(1) KMT.

[Rayuan ditolak]

Cases referred to:

Malayan Banking Berhad v. Siong Electronic Industries Sdn. Bhd. [1994] 3 CLJ 68 ***(refd)***

PB Securities Sdn. Bhd. v. Abdul Rashid Mohamed [1994] 3 CLJ 209 ***(not foll)***

Wing Teik Holdings Bhd. v. Yong Chee Thiam & Anor. [1994] 3 CLJ 653 ***(refd)***

Malayan Banking Berhad v. Lim Tee Yong & 3 Ors. [1994] 4 CLJ 558 ***(not foll)***

Legislation referred to:

Rules of the High Court 1980, O. 2 r. 2, O. 3 r. 5(1), O. 14 rr. 2(3), 4(1), O. 32 rr. 2, (1), (2), 13(1)(a), (2), (b)

For the appellant - Tunku Farik Tunku Ismail; M/s. Azim, Ong & Krishnan
For the respondent - K Santhrasergaran; M/s. Rastam, Singa & Co.

JUDGMENT

Siti Norma Yaakob JCA:

We had dismissed this appeal, made no order as to costs and directed that the deposit be refunded to the appellant. We now give our reasons for having decided so.

In the Court below, the respondent/plaintiff had sued the appellant/defendant to enforce a judgment obtained by the respondent in proceedings for damages for personal injuries brought by him against one Kassim bin Yunus, the driver of the motor vehicle that was involved in a collision with the respondent. At the material time the said Kassim bin Yunus had insured the motor vehicle with an insurance company known as L'Union Des Assurances De Paris, IARD, a French-based company whose business in Malaysia is conducted by the appellant.

The appellant entered a conditional appearance to the respondent's writ and statement of claim and this was followed by the appellant filing an application under O. 2 r. 2 of the Rules of the High Court, 1980 (RHC) to set aside the writ and statement of claim on the grounds that the respondent had sued the wrong party as the policy was issued by the French company and not by the appellant.

At the hearing of the application, the appellant raised a preliminary objection that the respondent's affidavit affirmed on 13 April 1995 cannot be relied upon by the respondent at the hearing, as the affidavit in reply did not comply with the provisions of O. 32 r. 13(2)(b) of the RHC.

The learned trial Judge disallowed the objection and hence the present proceedings before us.

Order 32 of the RHC deals generally with applications and proceedings in chambers and for the purposes of this appeal, rr. 2 and 13 have been put in issue. For ease of reference we reproduce these two rules:

> Issue of summons.
>
> 2(1) Issue of a summons by which an application in chambers is to be made takes place on its being sealed by an officer of the registry.
>
> (2) A summons may not be amended after issue without the leave of the Court.
>
> Notice of filing, etc. of affidavit.

13(1) Any party -

(a) filing an affidavit intended to be used by him in any proceedings in Chambers; or

(b) intending to use in any such proceedings any affidavit filed by him in previous proceedings,

must give notice to every other party of the filing or, as the case may be, of his intention to do so.

(2) Save as otherwise provided in these rules -

(a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and

(b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

We would like to add that O. 32 r. 13(2) was added by way of an amendment to the RHC for the orderly disposal of applications in chambers and it came into effect on 1 August 1993. It sets out the time frame within which affidavits, intended to be used in proceedings in chambers either in support of or in reply to such applications, are to be filed and served thereby preventing any last minute filing and service of such affidavits which before the amendment would have necessitated such applications being adjourned repeatedly thereby causing delay.

In this instant appeal, the appellant had on 28 February 1995 filed the summons-in-chambers together with its supporting affidavit affirmed on 27 February 1995. At the same time, the appellant's solicitors served an unsealed copy of the application together with the supporting affidavit on the respondent and this was received by the respondent on 3 March 1995.

Subsequently, the appellant served the sealed copy of the application issued under O. 32 r. 2(1) of the RHC together with the supporting affidavit on the respondent on 12 April 1995. This was followed on 14 April 1995 with the respondent filing his offending affidavit in reply which he had affirmed a day earlier and serving a copy of it on the appellant the same day it was filed.

The appellant now contends that the affidavit in reply cannot be used by the respondent at the hearing of the application as it was filed and served outside the time stipulated by O. 32 r. 13(2)(b). The appellant argues that since the respondent had received the affidavit in support on 3 March 1995, he had 14 days from that date within which to file and serve his affidavit in reply. Thus he had until 17 March 1995 to do so but the fact that he waited until 14 April 1995 to file and serve his affidavit in reply was clearly a breach of the provisions of O. 32 r. 13(2)(b).

Every application in chambers must normally begin by way of summons supported by an affidavit affirmed by the party making the application. Both the summons and affidavit must be filed and served on the other party as required by O. 32 r. (1) and (2) read together with r.13(1)(a) of the same Order. The right to reply by affidavit is then opened to the other party but this right must be exercised within the 14 days period stipulated by sub-rule (2)(b) of O. 32 r. 13. The issue raised before us is when does time start to run? On the facts of this case, is it from the first time the respondent received the appellant's affidavit in support together with the unsealed copy of the summons on 3 March 1995, as the appellant contends, or from the time the same affidavit was served on the respondent the second time together with the sealed copy of the summons on 12 April 1995 as contended by the respondent?

We answer this by considering firstly, the purpose why both affidavits were filed and served in the first place. In the case of the affidavit in support, it is to lay down the foundation of the application by way of the statements of facts and law disclosed in the affidavit. On the other hand, as its name suggests, the affidavit in reply is either to affirm or rebut such statements of facts or law and more often than not to object generally to the application being granted. With such specific purpose, it is only right and proper that the parties exchange affidavits with each other so that none is taken by surprise at the hearing of the application. The procedure for such an exchange is what is being questioned before us now.

It is true that on 3 March 1995, the respondent became aware of the appellant's impending application to have his writ and statement of claim set aside, although he must have anticipated this when the appellant entered a conditional appearance to the writ. As at 3 March 1995, no date of hearing of the application was stated in the summons as only the unsealed copy was served on the respondent. We now ask ourselves what is the status of the affidavit in support served together with the unsealed summons? Does it require an immediate reply by the respondent within the 14 days as required by the rules?

We reply in the negative as the purpose of serving the unsealed copy of the summons and the affidavit in support can be nothing more than to give due notice to the respondent of the nature of application and the grounds supporting the application. It cannot do anything more than this as the unsealed copy of the summons has yet to get the official stamp of the Court to clothe it with the authority that it has been issued pursuant to O. 32 r. 2(1) of the RHC. The affidavit in support cannot exist on its own independently of the summons and until the summons that it supports is sealed, the affidavit has no legal effect and neither does it create any obligation on the part of the party served with such an affidavit to reply to it. For this very reason, we consider that the

obligation to reply has not arisen when the unsealed copy of the summons together with the affidavit in support was served for the first time on the respondent on 3 March 1995.

However, we view the situation differently when the sealed copy of the summons together with the affidavit in support were served on the respondent on 12 April 1995. Since official recognition of the summons has been given with the sealing of the summons and the signing of the summons by the Registrar with the return date clearly stated in the summons, the respondent is legally bound to reply to the affidavit in support should he wish to object to the application being granted. This he did and by virtue of the provisions of O. 32 r. 13(2)(b), he had 14 days from 12 April 1995 to file and serve a copy of it on the appellant. He did so on 14 April 1995 well with within the time limited and to that end we confirm the decision of the Court below, that the respondent can make use of his affidavit in reply at the hearing of the appellant's application to have the writ and statement of claim set aside, to be correct. However, we declined making any order as to costs as the merits of the application have yet to be argued and determined.

In the course of arguing this appeal, YM Tunku Farik bin Tunku Ismail, learned Counsel for the appellant directed our attention to 4 cases that dealt with the applicability of O. 32 r. 13(2) in applications for summary judgment under O. 14 of the RHC. He invited us to lay some guidelines to sort out the practical difficulties experienced when the decisions in those cases are put into effect.

In the case of *Malayan Banking Berhad v. Siong Electronic Industries* (1981) Sdn. Bhd. [1994] 3 CLJ 68 Zakaria Yatim, J (as he then was) had to consider whether that particular Order and rule had a retrospective effect when dealing with an O. 14 application before him. The learned Judge had also to determine whether 2 affidavits, one affirmed by the plaintiff and the other by the defendant, both filed after O. 32 r. 13(2) came into effect, can be used at the hearing of the application. The learned Judge held that O. 32 r. 13(2) applies retrospectively and for that very reason the 2 affidavits could not be used in the proceedings before him. Whilst the decision in that case is not that glaringly relevant to the issue raised before us, the decisions of the other cases however are more in point.

In *PB Securities Sdn. Bhd. v. Abdul Rashid Mohamed* [1994] 3 CLJ 209, Richard Tallala, J whilst accepting that there is nothing incompatible between the provisions of O. 14, and the provisions of O. 32 r. 13(2) and that they can operate harmoniously with each other nonetheless held that the provisions of O. 32 r. 13(2) do not apply to proceedings brought under O. 14 or to affidavits filed or intended to be filed thereunder. On that finding, the learned Judge held that the defendant's affidavit in reply in the O. 14 proceedings before him, although filed and served on the plaintiff 4 days after the time limited for filing and service under O. 32 r. 13(2)(b) was correctly filed and served as of right.

This view was not shared by both Shaik Daud J (as he then was) in the case of *Wing Teik Holdings Bhd. v. Yong Chee Thiam & Anor.* [1994] 3 CLJ 653 and Mohd. Hishamudin Mohd. Yunus JC (as he than was) in the case of *Malayan Banking Berhad v. Lim Tee Yong & 3 Ors.* [1994] 4 CLJ 558.

In *Wing Teik Holdings,* the learned Judge held that although O. 14 r. 2(3) prescribes the time when an affidavit in support of an O. 14 application has to be served on the defendant, it is completely silent as to when an affidavit in reply has to be served by the defendant. In the absence of such a provision, the learned Judge held that service of the affidavit in reply ought to follow the general procedure laid down in O. 32 r. 13(2)(b) and to that end, it is incorrect to say that r. 13(2) has no application to O. 14 proceedings.

Mohd. Hishamudin Mohd. Yunus JC (as he then was) in *Malayan Banking Berhad v. Lim Tee Yong & 3 Ors, supra,* went one step further by stating that despite there being non-compliance with O. 32 r. 13(2)(b), the Court has a discretion to allow an affidavit in reply to be used in an O. 14 application. However, in the case before him, learned Judicial Commissioner declined to exercise his discretion as he found that there had been substantial delay in the filing and the service of the affidavit in reply.

Order 32 r. 13(2) begins with these qualifying words, **"Save as otherwise provided in these rules"** and we consider that the effect of those words is that when the RHC make specific provisions as to the filing and the service of affidavits for use in proceedings in chambers, those specific provisions must be adhered to. It is only when the RHC are silent as to the procedure of how such affidavits is to be filed or served that the general provisions of O. 32 r. 13(2) become applicable.

In proceedings for summary judgment under O. 14 r. 2 thereof prescribes the manner in which the application for summary judgment is to be made with the following provisions:

> 2(1) An application under r. 1 must be made by summons supported by an affidavit in Form 18 verifying the facts on which the claim, or the part of a claim, to which application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed.
>
> (2) Unless the Court otherwise directs, an affidavit for the purposes of this rule may contain statements of information or belief with the sources and grounds thereof.
>
> (3) The summons, a copy of the affidavit in support and of any exhibits referred to therein must be served on the defendant not less than 4 clear days before the return day.

A defendant intending to object to such an application may do so pursuant to the provisions of r. 4(1) and (2) which state as follows:

> 4(1) A defendant may show cause against an application under r. 1 by affidavit or otherwise to the satisfaction of the Court.
>
> (2) Rule 2(2) applies for the purposes of this rule as it applies for the purposes of that rule.

A closer reading of r. 2(3) and r. 4(1) reveals that in the case of the affidavit in support, there is a time frame mentioned when such an affidavit is to be served on the defendant. Rule 2(3) specifies it to be 4 clear days before the return date. We do not find any corresponding time frame mentioned in r. 4 or any other rule when the affidavit in reply should be filed and served other than stating that a defendant may show cause against the application by way of an affidavit in reply at sub-rule (1). The rule is silent as to when such an affidavit in reply is to be filed and served on the plaintiff. It is to fill this *lacuna* in the procedure that O. 32 r. 13(2)(b) can be relied upon to fill in the gap. The defendant has 14 days from the time he received the affidavit in support within which to reply. To that end we consider that the provisions of r. 13(2)(b) are applicable in proceedings for summary judgment under O. 14 and we confirm the finding reached in the *Wing Tiek Holdings Bhd.* case to have correctly stated the law on the procedure to be followed in O. 14 proceedings *vis-a-vis* the applicability of O. 32, r. 13(2)(b) to such proceedings.

Having stated that, we now ask ourselves whether the Court has the discretion to allow an affidavit in reply to be used in proceedings under O. 14 despite the fact that such affidavit had not complied with the provisions of O. 32 r. 13(2)(b).

We answer in the negative for the following reasons.

Order 32 r. 13(2)(b) makes it mandatory for such an affidavit in reply to be filed and served within the 14 days from the time the affidavit that it seeks to reply is received. The word 'must' as opposed to 'may' is used in the rule, and we interpret that to mean as implying a peremptory mandate as opposed to a mere direction or discretion as the word "may" implies. We equate the meaning of the word "must" as that given to the word "shall" and for that reason the choice of the word "must" in the rule does not create the existence of any discretion or empowers the Court to exercise such a discretion. To state otherwise would defeat the very purpose O. 32 r.13(2) was intended i.e. to prevent any last minute affidavit being filed so as to protract the hearing of any proceedings in chambers. For that reason, we cannot support the finding reached by *Malayan Banking v. Lim Tee Yong*

a *& 3 Ors., supra* on the existence of a discretion. We hasten to add that under such circumstances the defendant may apply for an abridgement of the period required to file the affidavit in reply pursuant to O. 3 r. 5(1) of the RHC.

b Reported by Gan Peng Chiang

c

d

e

f

g

h

i